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No. 98-1952

In The

Supreme Court of the United States

MARATHON OIL COMPANY,

Petitioner,

v.

BRUCE BABBITT, Secretary of the United States Department of the Interior,

UNITED STATES DEPARTMENT OF THE INTERIOR, BUREAU OF LAND MANAGEMENT, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

AMICI CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION, THE INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA, AND THE INDEPENDENT PETROLEUM ASSOCIATION OF THE MOUNTAIN STATES IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether an affected party has standing to challenge an unpublished federal agency policy that provides for private *ex parte* agreements, in direct contravention of explicit statutory and regulatory authority, between the agency and private parties as to how public lands will be managed?

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AMICI CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION, THE INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA, AND THE INDEPENDENT PETROLEUM ASSOCIATION OF THE MOUNTAIN STATES IN SUPPORT OF PETITIONERS

Mountain States Legal Foundation respectfully submits this *amici curiae* brief on behalf of itself, the Independent Petroleum Association of America, and the Independent Petroleum Association of the Mountain States. Pursuant to Supreme Court Rule 37(2)(a) this *amici curiae* brief is filed with the written consent of all the parties.[1]

IDENTITY AND INTEREST OF *AMICI CURIAE*

Mountain States Legal Foundation ("MSLF") is a non-profit, public interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of private access to public lands for environmentally sound economic and recreational activity. MSLF's membership includes individuals

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[1] Copies of the consent letters have been filed with the Clerk of the Court. In compliance with Supreme Court Rule 37(6), *amici curiae* represent that no counsel for any party authored this brief, in whole or in part, and that no person or entity, other than *amici curiae* and their members, made a monetary contribution for the preparation or submission of this brief.

and businesses from every State in the Union who regularly use public lands and participate in the public process of developing land management plans. MSLF's members thus rely heavily upon the regularized planning process and the regulatory stability provided by the completed planning documents prepared in accordance with the requirements of federal law.

The Independent Petroleum Association of the Mountain States ("IPAMS") is the regional trade association for the Rocky Mountain Region, representing the interests of independent oil and gas producers, service and supply companies, and companies that perform auxiliary services related to oil and gas development such as the gathering, transportation and marketing of petroleum products. IPAMS members operate in a 13-state area in the Rocky Mountain West, much of which is public land, including Colorado, New Mexico, Utah, Wyoming, Montana, Nebraska, North and South Dakota, Idaho, Oregon, Washington, Arizona, and Nevada. IPAMS has over 200 members and represents over 3,000 individuals. Collectively, the companies comprising IPAMS spend hundreds of thousands of dollars each year in exploratory research to select prime areas of public land for lease nomination. When certain lands designated as available for oil and gas development in Resource Management Plans ("RMPs") are suddenly and arbitrarily removed from leasing in violation of federal law, the expectations that promoted exploratory research are unfairly denied. Exploring for oil and gas on public land is extremely important to the livelihood of IPAMS companies and is extremely risky and uncertain without the added uncertainty, as occurred in this case, as to whether federal laws

will be implemented as required by Congress. A 1999 industry survey conducted by IPAMS shows that approximately half of the companies surveyed had more than 50 percent of their operations on lands managed by the Bureau of Land Management ("BLM").

The Independent Petroleum Association of America ("IPAA") is a national industry association representing more than 8,000 independent crude oil and natural gas explorers and producers in the United States. The IPAA is dedicated to ensuring a strong, viable domestic oil and natural gas industry, recognizing that an adequate and secure supply of energy is essential to the national economy. IPAA operates in close cooperation with the 44 unaffiliated independent national, state, and regional associations, which together represent thousands of royalty owners and the companies that provide services and supplies to the domestic petroleum industry. IPAA members are predominantly small businesses. The typical company employs 10 full-time and 3 part-time employees and has a net income of $250,000. Despite the small size of individual producers, their collective impact is quite large. Collectively, they produce 65 percent of the natural gas and nearly 40 percent of the crude oil consumed by Americans. IPAA members are highly dependent on access to federal land in accordance with federal law for their activities; 42 percent of its members currently hold federal or Indian leases.

Consequently, *amici* have a particularized interest in seeing that public land management decisions are governed by those laws enacted by Congress and by regularized, published processes and procedures that provide them meaningful opportunities to forward their interests,

and that such processes produce standards and guidelines that *amici* may rely upon in their dealings with land managers and in making investment decisions with regard to public lands.

OPINIONS BELOW, JURISDICTION, AND STATEMENT OF THE CASE

Amici hereby adopt Petitioners' description of the Opinions Below, Statement of Jurisdiction, and Statement of the Case. *See*, Petitioners' Brief ("Pet. Bf.") at 1-9.

SUMMARY OF ARGUMENT

This Court should grant *certiorari* in this case for several reasons. The decision of the Tenth Circuit threatens to unsettle the legal certainty that the domestic petroleum industry and other users of public lands formerly found in RMPs and thus threatens to curtail domestic petroleum exploration and with it domestic energy security. *Marathon Oil Company v. Babbitt*, No. 97-1254 (10th Cir., filed January 6, 1999). Similarly, the decision threatens to dampen public confidence and participation in the federal land planning processes by demonstrating that the apparent statutory, regulatory, and procedural integrity of the process is a mere chimera to be overridden in backroom deals between political appointees and special interest groups.

Moreover, the decision of the Tenth Circuit ignores the development of this Court's jurisprudence regarding procedural injuries. By mischaracterizing Marathon's

injury as more substantive than procedural, the Tenth Circuit misapplied the redressability requirement. Should the Tenth Circuit's view prevail, the diminished burden of redressability this Court has found applicable to injuries of a primarily procedural nature would be effectively frustrated.

ARGUMENT

I. THIS COURT SHOULD GRANT *CERTIORARI* BECAUSE THE ISSUE IN THIS CASE IS OF NATIONAL IMPORTANCE.

A. The Decision Of The Tenth Circuit Threatens To Hinder The Continued Exploration For And Development Of Domestic Petroleum Supplies.

It has been the policy of this Court to grant *certiorari* in cases where the settled economic expectations of individuals are upset by government action. This Court has evinced this concern for regulatory certainty in the context of the Takings and *Ex Post Facto* clauses. *See, e.g., Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998); *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994) ("Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted"); and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

IPAA and IPAMS members regularly rely upon the laws governing the use of public lands as enacted by Congress, as well as the standards and policies articulated in Resource Management Plans and other federal

planning documents, when formulating their exploration programs and financing activities. In the event that these laws and plans can no longer be relied upon because the decision of the Tenth Circuit is allowed to prevail, much of the domestic petroleum exploration activity in the Mountain West will be curtailed, if not ended altogether. Also ended will be many jobs in the industry, much of the development of new environmentally sensitive, petroleum recovery technology, and a large measure of this Nation's energy security and independence.

B. The Decision Of The Tenth Circuit Undermines Public Confidence That Public Lands Will Be Administered In Accordance With Federal Law.

The grassroots organizations and individual members of MSLF similarly rely upon federal public land law and public lands planning documents to inform their understanding of the recreational, economic, and esthetic opportunities available on public lands. The investments made by these affected interests may not be as great monetarily as those made by energy companies but are individually as important. Whether the planning documents inform a small logger of the availability of land suitable for timber harvest, an off-road vehicle user of her ability to access a particular piece of desert, or a hiker of the likelihood that he will be free from the interruptions of the former two, millions of Americans rely upon the inviolability and certainty of these documents.

Moreover, *amici* and others regularly engage in the processes that generate these documents. Beginning with

initial scoping of issues and continuing with the submission of written comments, *amici* and others forward their particular views as to the proper use of public lands and in so doing bring their invaluable insight and experience to the attention of public land managers. When the integrity of this process is subverted by the sort of unpublished policies and *ex parte* agreements at issue in this case, the confidence of all in the value of participating in the process is diminished and public decision-making will suffer as a result.

Moreover, since the adoption of the Federal Land Policy and Management Act (FLPMA) in 1976, under which authority the RMPs are required to be developed, *amici* and their members have expended millions of man-hours and tens, if not hundreds, of millions of dollars participating in the processes required by Congress through the FLPMA. All across the West, in those states in which the presence of public lands requires the time-consuming, land use planning process mandated by Congress, *amici* and their members have devoted a substantial and even incredible portion of their work and free time participating in the FLPMA-mandated land use planning process. Individuals who have scores of other demands on their time, including jobs, family, churches, and friends, have devoted an inordinate amount of time to the activities required by the FLPMA-mandated process including attending meetings, reading scoping documents, studying lengthy environmental documents, attending more hearings, and participating in administrative appeals. If the decision of the Tenth Circuit is allowed to stand, all of those efforts, not just in this case, but in similar situations across the West, will have been

for naught. Not only will that result frustrate the will of Congress, but it will end any public confidence whatsoever that the process mandated by Congress or their participation in it has any meaning, let alone importance.

II. THIS COURT SHOULD GRANT *CERTIORARI* BECAUSE THE TENTH CIRCUIT'S DENIAL OF STANDING VIOLATED THIS COURT'S WELL-ESTABLISHED PROCEDURAL INJURY JURISPRUDENCE.

This Court has held consistently that in order to support standing for a primarily procedural injury, Article III of the Constitution requires that a litigant must show a procedural shortcoming that injures a discrete, concrete interest. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 571-72 (1992). The Tenth Circuit failed to apply this Court's procedural injury jurisprudence, which failure has resulted in unsettling uncertainty among *amici* organizations and their members.

A. The Tenth Circuit's Unreasonable Characterization Of The Injury Suffered By Marathon Unfairly Led To An Incorrect Redressability Determination.

This Court's standing jurisprudence requires that a litigant allege an "injury in fact" that is redressable by a favorable decision. Where primarily procedural injuries are alleged, the Tenth Circuit has repeatedly and unfairly viewed the injury suffered for purposes of assessing redressability as a substantive rather than a procedural violation. The Tenth Circuit improperly characterized the

"injury in fact" suffered by Marathon as a lost mineral lease rather than the procedural injury associated with the loss of an opportunity to bid competitively for that lease. Similarly, in *Mount Evans Co. v. Madigan*, 14 F.3d 1444 (10th Cir. 1994), the Tenth Circuit ruled that a potential concessionaire doing business on public lands lacked standing to challenge the Forest Service's failure to rebuild a damaged concessions facility on the ground that the concessionaire's injuries were not redressable. The Tenth Circuit ruled that, even if the concessionaire were successful in having the facility rebuilt, there was no guarantee the concessionaire would successfully obtain the operation contract. *Id.* at 1451.

B. The Denial Of An Otherwise Available Competitive Opportunity Is Sufficient "Injury in Fact" For Purposes Of A Procedural Injury.

This Court has recognized previously that probable economic injury resulting from governmental actions that alter competitive conditions is sufficient to satisfy the Article III "injury-in-fact" requirement. *See, e.g., Bryant v. Yellen*, 447 U.S. 352, 367-68 (1980) (holding farmers' speculative opportunity to purchase property at below market prices given favorable decision was sufficient to establish injury in fact for Article III purposes.); and *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 72-78 (1978) (holding that speculative prospect that atomic energy plant would become economically infeasible without subsidy was sufficient for challenge of the statute conferring subsidy by community group). Marathon's allegations that it could have not only bid on the subject leases but also participated in oil and gas field

development through a variety of commonplace industry contracting practices demonstrate a sufficiently concrete and particular "injury in fact" to support standing for a procedural deprivation.

C. The Redressability Requirement For Procedural Injuries Requires An Attenuated Degree Of Certainty That Marathon Has Met.

In assessing the likelihood that an injury will be redressed by a favorable decision, this Court has posited that there must be a prospect of obtaining relief from the injury that is not "too speculative." *Allen v. Wright*, 468 U.S. 737, 752 (1984). Because a procedural injury only admits of a procedural remedy that may not necessarily ensure the concrete outcome that a litigant might ultimately seek, this Court has required a diminished likelihood of redress in these cases. Specifically, this Court recognized:

> There is this much truth to the assertion that "procedural rights" are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right *without meeting all the normal standards for redressability* and immediacy. Thus, under our case law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 572, n.7 (1992) (emphasis added).

In *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656 (1993), this Court squarely addressed the issue of redressability where the concrete interest affected by a primarily procedural injury is the chance to compete for an economic opportunity.

The plaintiff in *City of Jacksonville* alleged that a discriminatory policy precluded it from bidding competitively on city contracts. Plaintiff's standing was challenged on the basis that Plaintiff could not show that, if given the opportunity to bid, the necessary result would be a successful bid by one of its members. This Court rejected that challenge on the ground that to establish standing "a party challenging a set aside program like Jacksonville's need only demonstrate that it is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so on an equal basis." *Id.* at 666. With the injury framed as a denial of an opportunity rather than the denial of a result, this Court easily concluded that "a judicial decree directing the city to discontinue its program would 'redress' the injury." *Id.* at 666 n.5

Although *City of Jacksonville* arose in the equal protection context, its reasoning should be applied to this case in which Marathon alleges, among other things, that an illegally adopted and implemented policy frustrated the competitive opportunities that would otherwise have been available to it. Clearly, Marathon is able to "demonstrate that it is able and ready to bid [for oil and gas

leases on the public lands in question] and that [an illegal action] prevents it from doing so . . . " Furthermore, "a judicial decree directing [the Secretary] to discontinue [its illegal action] would 'redress' the injury."

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court grant the Petition for *Writ of Certiorari* of Marathon Oil Company.

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